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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 332

RUPERT WATSON d/b/a MAINE-WIDE ADJUSTERS,

Appellant,

—v.—

STATE OF MAINE BANK COMMISSIONER,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

JURISDICTIONAL STATEMENT

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IN THE

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No. .....

RUPERT WATSON d/b/a MAINE-WIDE ADJUSTERS,

Appellant,

—v.—

STATE OF MAINE BANK COMMISSIONER,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Judicial Court of the State of Maine entered on October 27, 1966 denying injunctive relief and declaring valid the State of Maine's 1965 "Act regulating collection agencies," now 32 M. R. S. A. §§571-583 (1966 pocket part) inclusive, and particularly §575. Appellant submits this statement to show that the Court has jurisdiction and that substantial questions are presented.

Opinion Below

The opinion and order of Supreme Judicial Court of Maine was rendered on October 27, 1966, and is reported at —— Me. ——, 223 A. 2d 834 (1966). The opinion and judgment in this case are set out in the Appendix *infra* at pp. 27-39.

Jurisdiction

This action was initiated in Penobscot County Superior Court on February 28, 1966. On March 5, 1966 an amended complaint was filed. The action was brought under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and under Article 1, Section 10 of the Constitution of the United States; and under Article 1, Sections 1, 6A and 11 of the Constitution of the State of Maine. On March 10, 1966, a temporary restraining order was granted, pending a hearing on the request for a preliminary injunction. On May 5, 1966, because of the important issues of law that were involved, the judge of the Penobscot County Superior Court executed an order sending the litigation "On Report" to the Supreme Judicial Court of Maine sitting as a Law Court, pursuant to Rules 1 and 72, Maine Rules of Civil Procedure, 8 M. R. S. A. (1965). That court was asked to pass on and did pass on the constitutionality of Section 575 of Maine's 1965 "Act regulating collection agencies," now 32 M. R. S. A. §§571-583 (1966 pocket part), inclusive. The relief requested was an injunction against the Appellee, an official of the State of Maine, from enforcing the statute complained of.

By decision and opinion entered on October 28, 1966, the Supreme Judicial Court of Maine gave judgment for the Appellee and denied all relief requested by the Appellant. Notice of Appeal was filed in the Supreme Judicial Court of Maine on January 26, 1967.

On March 28, 1967, pursuant to Rule 13(1) of this Court, by order of Robert B. Williamson, Chief Justice of the Supreme Judicial Court of Maine, an extension was granted

until May 12, 1967 for the filing of this Jurisdictional Statement. On May 11, 1967 a similar order was entered by Chief Justice Williamson, by which an additional extension of forty-five (45) days was granted from May 11, 1967 in which to file this Jurisdictional Statement.

Jurisdiction of the Supreme Court of the United States to review the decision of the Supreme Judicial Court of Maine by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *DeVeau* v. *Braisted*, 363 U. S. 144; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

Statutes Involved

The provisions of the law involved in this case are: Chapter 430 Maine P. L. 1965, now 32 M. R. S. A. §§571-583 inclusive, and particularly §575. Because of its length, the text of the statutory provisions is set out in the Appendix, *infra*, at pp. 40-52.

Questions Presented

1. Is 32 M. R. S. A. §575, on its face, and as interpreted and applied in this case, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution in that it effects a deprivation of liberty and property without due process of law by erecting an absolute, unjustifiable bar to receipt, by persons in Appellant's position, of licenses to operate collection agencies in the State of Maine?

2. Is the foregoing statute, on its face, and as interpreted and applied in this case, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, in that, without procedural due process of law, it establishes a permanent lifelong bar to Appellant's pursuit of a lawful vocation, solely because of a prior criminal conviction, and does not provide any opportunity for persons in Appellant's position to attempt to prove rehabilitation?

3. Is the foregoing statute, on its face, and as interpreted and applied in this case, in violation of the prohibition against *ex post facto* laws contained in Section 10 of Article I of the United States Constitution?

Statement of the Case

This suit challenges the constitutionality of §575 of Title 32, M. R. S. A. (1966 pocket part), which disqualifies, absolutely, any person who has been convicted in any state or federal court of certain criminal offenses, including embezzlement, from receiving a license to operate a collection agency in the State of Maine.

The Appellant, Rupert G. Watson, doing business as Maine-Wide Adjusters, is a citizen of the United States and of the State of Maine, who resides in the City of Brewer, Penobscot County, Maine. From September, 1948 to January, 1960, the Appellant owned and operated, in the State of Maine, a collection agency. On January 28, 1960 he was convicted of the crime of embezzlement and was sentenced to a term of imprisonment in the Maine State Prison at Thomaston, from which he was released

on February 25, 1963. After his release, the Appellant renewed the operation of his collection agency.

In 1965 the 102nd Legislature of the State of Maine passed "An Act regulating collection agencies," effective January 1, 1966, Chapter 430, P. L. 1965, which is now Ch. 10, 32 M. R. S. A. §§571-583, inclusive (1966 pocket part). This statute provides for comprehensive governmental supervision and regulation to assure the appropriate functioning and financial rectitude of the collection industry in the State of Maine.

Early in 1966, in compliance with the "Act to regulate collection agencies", the Appellant, who had by then operated a collection agency for fifteen years, applied for a license, supported by a required financial statement prepared by an accountant, and a $3,000 cash deposit as a bond, which was found to be acceptable by the Department of Banks and Banking. On March 1, 1966 the State Bank Commissioner, who is charged under the Act with the chief responsibility to supervise and regulate collection agencies, informed the Appellant by letter that, pursuant to 32 M. R. S. A. §575, his application was denied because of his conviction for embezzlement. No other reason was put forth for the refusal to grant Appellant a license. His cash deposit was subsequently returned.

Appellant then brought suit in the Penobscot County Superior Court for declaratory judgment on the validity of Section 575 and for injunctive relief. Because of the important issues of law, on agreement of the parties and the court, the case was sent "on report," with an agreed statement of facts, to the Supreme Judicial Court of Maine which, by decision and order dated October 27, 1966, re-

solved all federal and state constitutional issues against the Appellant, declared the statute to be valid, and denied the injunctive relief that had been requested.

The Questions Are Substantial

By the terms of the Act, a "collection agency," defined therein, 32 M. R. S. A. §§571-572, to include proprietorships so operating, is required to procure an annual license for each of its offices, at $100 apiece, from the State Bank Commissioner, 32 M. R. S. A. §573. Operation of a collection agency without a license is a misdemeanor punishable by a $500 fine or up to six months imprisonment. 32 M. R. S. A. §573(2).

With one exception, the Bank Commissioner is authorized generally to exercise his own discretion in granting, renewing, suspending and revoking licenses.[2] He may deny a license "if the applicant is not qualified under this chapter", 32 M. R. S. A. §573(5); he may renew a license only "so long as [he] regards the business as responsible and safe", 32 M. R. S. A. §573(3); and he may suspend or revoke a license "if a licensee violates any provisions of this chapter,[3] or fails to maintain its financial condition sufficient to qualify for a license on an original application",[4] 32 M. R. S. A. §578. In one particular, however,

[1] Licenses may be suspended or revoked only after notice and hearing. 32 M. R. S. A. §578. Suspensions, revocations, denials and failures to renew are all judicially reviewable. 32 M. R. S. A. §579.

[2] 32 M. R. S. A. §576 describes some twenty-two "Prohibited practices," seven of which involve, or are concerned with potential misuse of funds.

[3] 32 M. R. S. A. §581 authorizes the Bank Commissioner, with court assistance, to exercise broad powers to take possession of and liquidate "Delinquent [Insolvent] collection agencies."

Maine's Legislature has prohibited the Bank Commissioner from exercising sound administrative discretion in his licensing and regulatory capacities. 32 M. R. S. A. §575 provides absolutely, that:

> *"No license shall be granted* to any applicant if an individual or to any partnership or corporate applicant if such applicant or any partner of a partnership applicant or officer or director of a corporate applicant, or employee of the foregoing has been convicted in any state or federal court of the crime of forgery, fraud, obtaining money under false pretenses, embezzlement, extortion, larceny, burglary, breaking and entering, robbery, criminal conspiracy to defraud, or bribery, *of which the record of conviction or a copy certified by the clerk or judge of the court shall be conclusive evidence.* No license shall be granted to any lawyer whose license to practice law has been suspended or revoked, during the effective period of such suspension or revocation." (Emphasis supplied.)

Apparently, "pardon by the appropriate state or federal authority qualifies one to apply for restoration of a license" that he has lost, presumably as a result of an exercise of discretion by the particular Maine State Board authorized to issue a license, because of suspension on the ground of a felony conviction. *A Compilation of State and Federal Statutes Relating to Civil Rights of Persons Convicted of Crime* p. 17 (Fed. Probation Officers' Ass'n 1960). However, research discloses nothing to indicate that in the State of Maine a pardon tolls the force of an absolute disqualification statute, such as Section 575. See, *e.g.*, Tappan, Crime, Justice and Correction 428 (1960); Rubin, The

LAW OF CRIMINAL CORRECTIONS 608-09 (1963); Note, *The Effect of Statutes on the Civil Rights of Convicts*, 47 MINN. L. REV. 835, 848-49 (1963); *Hawker* v. *New York*, 170 U. S. 189, 204 (dissenting opinion); see, generally, *e.g.*, Tappan, *The Legal Rights of Prisoners*, 293 ANNALS 99, 103 n. 19 (1954). Moreover, in the State of Maine the pardoning power resides in the unreviewable discretion of the Governor and the Executive Council of Maine. See Maine Const., Art. V, pt. 1, §11; Ch. 307, 15 M. R. S. A. §§2161-2166 (1964); 34 M. R. S. A. §§1504, 1552(6) (1964); *Baston* v. *Robbins*, 153 Me. 128, 135 A. 2d 279 (1957); *Doyle* v. *State*, 158 Me. 190, 181 A. 2d 586, 590 (1962), *cert. denied*, 371 U. S. 849. Restoration of rights, therefore, is "a matter of gubernatorial leniency rather than a considered policy of correctional rehabilitation." Tappan, *supra*, 293 ANNALS at 103 n. 22; see also, *e.g.*, Note, *The Effect of a Pardon on License Revocation and Reinstatement*, 15 HASTINGS L. J. 355 (1964); Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 405-406 (1967). Nevertheless, after the decision of the Supreme Judicial Court of Maine, the Appellant undertook unsuccessful efforts to secure a pardon. On January 10, 1967 he applied for a pardon. He was given a hearing on his application on April 5, 1967, and his application was denied on April 7, 1967. See certification of the office of the Secretary of State of Maine, appendix, *infra*, pp. 54-55.

The absolute bar to licensing of persons in the Appellant's situation, on the ground of acts performed either *after or before the statute's passage*, crowns a series of more moderate and reasonable provisions designed both to assist and direct the Bank Commissioner in his task of insuring, through the exercise of his comprehensive li-

censing and regulatory powers, the financial integrity of collection agencies. First, all applicants for licenses must file surety company bonds with the Bank Commissioner. 32 M. R. S. A. §574. Second, a certified copy of the applicant's charter and by-laws, and a broad, irrevocable power-of-attorney, for service of process purposes, must also be filed. 32 M. R. S. A. §573(5). Third, upon request an applicant must file financial reports and statements with the Bank Commissioner, who, in deciding whether to grant a license, "may make or cause to be made an independent investigation concerning the applicant's [and his management personnel's] reputation, integrity, competence and net worth." 32 M. R. S. A. §573(4). Fourth, "The Commissioner may investigate the collection records of a licensee and for that purpose shall have free access to the books and records of a licensee relating thereto." 32 M. R. S. A. §578. Fifth, the Commissioner is empowered to require "at any time . . . a licensee to submit to the department [of Banks and Banking] a verified statement for examination by the commissioner so that he may determine whether the licensee is financially responsible to carry on a collection agency business within the intents and purposes of this chapter." 32 M. R. S. A. §580(1). Sixth, each licensee is required "to keep such books and records in his place of business in this State as will enable the commissioner to determine whether the provisions of this chapter are being complied with." 32 M. R. S. A. §580(2). Seventh, records of each account must be preserved for a period of six years after it is closed out. *Ibid.* Finally, as already noted, the Bank Commissioner is given broad powers to suspend, revoke or refuse to renew licenses "if a licensee violates any provisions of this chapter, . . . or fails to

maintain its financial condition sufficient to qualify on an original application. . . . " 32 M. R. S. A. §578; see also 32 M. R. S. A. §573(3); notes 1 and 2 *supra*.

1. 32 M. R. S. A. §575, on its face, and as interpreted and applied in this case, violates Section 1 of the Fourteenth Amendment to the United States Constitution in that it effects a deprivation of liberty and property without due process of law by erecting an absolute bar for the receipt, by a person in Appellant's position, of licenses to operate collection agencies?

This Court recently declared that the framers of the Fourteenth Amendment "wanted to put citizenship beyond the power of any governmental unit to destroy," *Afroyim* v. *Rusk*, 35 U. S. L. WEEK 4502, 4505 (May 29, 1967), and that "the Fourteenth Amendment prevents Congress [or any governmental unit] from doing any of these things": "'abridge,' 'affect,' 'restrict the effect of,' and 'take away' citizenship." 35 U. S. L. WEEK at 4506. The right to due process of law, as protected by the Fourteenth Amendment is one of the most important attributes of "citizenship" in this country. As Mr. Justice Fortas, speaking for the Court, recently wrote, with specific reference to its procedural aspects, "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise." *In re Gault*, 87 S. Ct. 1428, 1439-1440. Moreover, in numerous decisions the Court has established the fundamental principle that the right to work at the occupation of one's choice is a basic liberty pro-

tected by the due process clause, and that the State can restrict this liberty only with and for good cause. *E.g.*, *Truax* v. *Raich*, 239 U. S. 33, 41; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-39; *Greene* v. *McElroy*, 360 U. S. 474, 492; see also, generally, *Hallinan* v. *Committee of Bar Examiners*, 55 Cal. Rptr. 228, 421 P. 2d 76 (S. C. Calif. In Bank, 1966).

Absolute disqualification of convicted felons, such as found in 32 M. R. S. A. §575, from participation in particular occupations raises serious questions of deprivation of this liberty and property without due process of law. Such disqualifications are relics of "the old retributive penology [that] was predicated on the view that the proven criminal was an 'outlaw' without legal rights. Not only might he be subjected to the crudest penalties, *but he lost his citizenship* (if not his life), his identity of person, and his property." Tappan, *The Legal Rights of Prisoners*, 293 ANNALS 99 (1954) (emphasis supplied). *Accord*, Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 423 (1967). Such an approach is inconsistent with our contemporary regard for the individual and citizen and for his rights. See *Afroyim* v. *Rusk*, 35 U. S. L. WEEK 4502 (May 29, 1967). Any rash, purely retributive approach to penology is, moreover, markedly inconsistent with contemporary correctional theory and practice, which must bear upon the contemporary meaning to be given the "liberty" and "property" protected by the Fourteenth Amendment. Compare *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663, 669-670; *Griswold* v. *Connecticut*, 381 U. S. 479; *Rochin* v. *California*, 342 U. S. 165.

This Court has recognized that "punishment serves several purposes; retributive, rehabilitative, deterrent and

preventive." *United States* v. *Brown*, 381 U. S. 437, 458. Absolute bars to entry into occupations, such as established in 32 M. R. S. A. §575, interfere with achievement of most, and perhaps the best aims of punishment and correction—rehabilitation, deterrence, and prevention.[4] See, Report by the President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 165 (1967). In fact, such absolute bars increase "the likelihood of recidivism" "by so handicap[ping] an individual as to make it difficult for him to live honestly after release." Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 423 (1967), quoting from DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 74 (1959).

The disruption to the rehabilitative aims of correction caused by absolute disqualifications is particularly egregious. As the Task Force on Corrections of the President's Commission on Law Enforcement and Administration of Justice recently observed:

> "The kind of job a person holds determines, to a large extent, the kind of life he leads. This is true not merely because work and income are directly related, but also because employment is a major factor in an individual's position in the eyes of others and indeed of himself. Work is therefore directly related to the goals of corrections." TASK FORCE REPORT: CORRECTIONS p. 32 (1967).

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[4] Notably, several members of the Court indicated doubt as to the constitutional validity of retribution as an aim for punishment, when they declined to include retribution in a list of examples of permissible aims. *Rudolph* v. *Alabama*, 375 U. S. 889 (Goldberg, Douglas and Brennan, JJ., dissenting from the denial of certiorari).

The President's Commission itself recommends the reduction of "barriers to employment posed by discrimination, the misuse of criminal records and maintenance of rigid job qualifications." THE CHALLENGE OF CRIME IN A FREE SOCIETY 77 (1967), noted that:

> "There are many specific barriers to reentry. Perhaps the most damaging are those limiting employment opportunity. The inability of ex-offenders to obtain the bonding needed for certain kinds of employment; licensing restrictions that deny them access to certain kinds of work; and outright ineligibility for many forms of employment. The rituals surrounding the banishment of a lawbreaker are very potent, but there are no rituals to remove from him the label of offender when he seeks to reenter the community." *Id.* at 168-169.

Review of the State of Maine's legislative code reveals that Maine's laws dealing with occupational licensing create precisely the kind of situation that has caused much of the concern on the part of the President's Commission. See *A Compilation of State and Federal Statutes Relating to Civil Rights of Persons Convicted of Crime* pp. 16-17 (Fed. Probation Officers' Ass'n 1960). Title 32 of the *Maine Revised Statutes Annotated*, collects most of Maine's statutes regulating "Professions and Occupations," ranging from Accountants, 32 M. R. S. A. Ch. 1, §§1-57, to Veterinarians, 32 M. R. S. A. Ch. 71, §§4701-4803, with stops all along the alphabet. These laws, conforming to no rational order or system, occupy 339 pages in the main portion of volume 15 M. R. S. A. (1965) and 49 pages in the 1966 pocket part. Express provision is made, with respect to numerous occu-

pations, for *the exercise of discretion* by the appropriate licensing authorities to revoke, suspend or refuse to issue or reissue licenses upon the conviction of a licensee or an applicant of crimes[3] (generally limited to those involving moral turpitude) or of felonies.[5] Numerous provisions also empower licensing boards to pass upon the "good moral character" of similar traits of the applicants.[6] Some provisions even appear to authorize licensing authorities to exercise unfettered discretion in determining whether or not to issue licenses,[7] some either give no discretion or give unfettered discretion.[8] Aside from the one established in 32 M. R. S. A. §575, the provision at issue in this case, research has disclosed only one other absolute disqualification of persons convicted of crimes from licensing—32 M. R. S. A. §3701, a law of very curious and limited application, permitting the licensing of practitioners of healing arts or

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[3] See 32 M. R. S. A. §§55 (Accountants), 254 (Auctioneers), 407 (Barbers), 552 (Chiropractors), 1109 (Dentists and Dental Hygienists), 1111 (same), 1455 (Funeral Directors and Embalmers), 1656 (Hairdressers and Beauticians), 2105 (Nurses and Nursing), 2556 (Optometrists), 2702 (Osteopaths), 3053 (Physical Therapists), 3203 (Physicians and Surgeons) (1966 pocket part), 4111 (Real Estate Brokers and Salesmen), 4701 (Veterinarians).

[5] See 32 M. R. S. A. §§55 (Accountants), 251 (Auctioneers) (1966 pocket part), 402 (Barbers), 552 (Chiropractors), 852 (Dealers in Securities) (This occupation, as Appellant's, is subject to the supervision of the Bank Commissioner), 1002 (Dentists and Dental Hygienists), 1652 (Hairdressers and Beauticians), 1707 (Manufacturers and Sellers of Lightning Rods), 2701 (Osteopaths), 2702 (Same), 2902 (Pharmacists) (1966 pocket part), 2955 (Photographers), 3102 (Physical Therapists), 3552 (Physicians and Surgeons), 3951 (Psychologists), 4105 (Real Estate Brokers and Salesmen); 4 M. R. S. A. §804 (Lawyers).

[6] See 32 M. R. S. A. §3801 (Private Detectives).

[7] See 32 M. R. S. A. §4252 (Tattoo Artists); see also, 32 M. R. S. A. §§4351 (Taxidermists), 4353 (Fur dealers), 4551 (Itinerant vendors).

sciences, who are not registered as physicians, surgeons, nurses and the like, and who had engaged in such a practice in the State of Maine prior to January 1, 1931.*

It is within this foregoing elaborate jungle of regulations upon entry by persons convicted of crimes into numerous occupations and professions that 32 M. R. S. A. §575 must be judged. When viewed in this context, the Appellant submits that Section 575 can only be seen as fixing upon the convict a permanent, disadvantaged "status" and, in effect, continuing his punishment after his release from prison, for acts or situations no longer within his volition. Maine's absolute disqualification provision, therefore, raises substantial constitutional questions involving due process of law. See, *e.g.*, *Robinson* v. *California*, 370 U. S. 660; *Easter* v. *District of Columbia*, 361 F. 2d 50 (D. C. Cir. 1966); *Driver* v. *Hinnant*, 356 F. 2d 761 (4th Cir. 1966); *cf.*, *Lambert* v. *California*, 355 U. S. 225; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Edwards* v. *California*, 314 U. S. 160.

Assuming arguendo that in some circumstances the disqualifications from licensing established in 32 M. R. S. A. §575 bear some rational relationship to a legitimate State interest of protecting the public from financial misfeasance, a serious question is nevertheless presented of whether

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* It is perhaps more notable, that a number of licensing authorities *are authorized to exercise discretion* over the issuance, revocation or suspension of licenses only with respect to technical qualification for performance in the occupation or profession or to actual acts of misfeasance in the course of performance in the occupation or profession. 32 M. R. S. A. §§202 (Architects), 206 (same), 207 (same), 1155 (Electricians), 1356 (Engineers), 1802 (Manufacturers and Bottlers of Nonalcoholic Beverages), 1851 (same), 2061 (Nurserymen and Arborists) (1966 pocket part), 2355 (Oil Burner Men), 2402 (same), 2751-2764 (Outdoor Advertisers), 3501-3507 (Plumbers) (1966 pocket part), 4154 (Sardine Packers), 4451-4452 (Transporting or Cutting of Christmas Trees) (pockets parts 1966).

Section 575's absolute prohibition interferes arbitrarily and unconstitutionally with the Appellant's right to freely choose his occupation.

First, this Court has ruled that: "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *City of Little Rock*, 361 U. S. 516, 524. Obviously, restriction by the State of the individual's free choice of occupations is such "a significant encroachment upon personal liberty," justified only by "showing a subordinating interest which is compelling."

It is in this respect that the present case differs from *De Veau* v. *Braisted*, 363 U. S. 144. There a plurality of the Court sustained a New York statute which operated to exclude felons from holding office in waterfront labor organizations only after careful examination of the special circumstances surrounding the New York law. Stressing the mass of evidence on which the legislature based its action, the plurality observed that "legislative investigation had established that the presence of ex-convicts on the waterfront was not a minor episode but constituted a principal corrupting influence" in a situation of the New York waterfront that was characterized as "gangrenous." 363 U. S. at 157-58. There has been no such strong demonstration of such "a subordinating interest which is compelling" in this case. *Bates* v. *City of Little Rock*, 361 U. S. 516, 524. See Comment, *Civil Disabilities of Felons*, 53 Va. L. Rev. 403, 416-418 (1966).

As one commentator has observed, *De Veau* v. *Braisted*, 363 U. S. 144, indicates "that the Court will now look closely at laws imposing civil disabilities on felons and will be reluctant to sustain those that are not buttressed by the

sort of legislative evidence found in *De Veau*." Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 418 (1966). Such scrutiny is likely to disclose that the State of Maine has some interest in supervising the collection agency industry. But the complex and comprehensive regulatory and licensing provisions of Maine's "Act regulating collection agencies," 32 M. R. S. A. §§571-583, inclusive (1966 pocket part), reveals that the State has more limited means at its disposal to assure attainment of any of its legitimate interests. Even if 32 M. R. S. A. §575 were eliminated, the Bank Commissioner has been vested with ample power to assure preservation of the State's legitimate interests. See "Statement," *supra*, pp. 8-10, and, footnote 9, *supra*, touching on alternative approaches already existing in the *corpus* of Maine law; TASK FORCE REPORT: CORRECTIONS 91 (1967), recommending other alternative procedures to preserve the public interest. As this Court has held, "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U. S. 479, 488.

2. 32 M. R. S. A. §575, on its face, and as interpreted and applied in this case, violates Section 1 of the Fourteenth Amendment to the United States Constitution, in that, without procedural due process of law, it establishes a permanent lifelong bar to Appellant's pursuit of a lawful vocation, solely because of a prior criminal conviction, and does not provide any opportunity for persons in Appellant's position to attempt to prove rehabilitation?

In the absence of a strong showing such as was made in *De Veau* v. *Braisted*, 363 U. S. 144, to justify across-the-board disqualification of felons, this Court has held that before disqualifying an applicant from an occupation (in the particular case admission to the practice of law) on the ground of a prior offense, "the nature of the offense which he has committed must be taken into account." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 243.[10] *Cf., e.g., Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Slochower* v. *Board of Education*, 350 U. S. 551, 558-59. The Court has also indicated that the appropriate inquiry to be made by the licensing or admitting authority might be to consider, "whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice in the *light of all material circumstances before the Board.*" *Barsky* v. *Board of Regents*, 347 U. S. 442, 451. (Emphasis supplied.) As demonstrated in the discussion under Question 1, the extent

[10] The *De Veau* and *Schware* cases significantly limit any proposition that may be read into *Hawker* v. *New York*, 170 U. S. 189, "that states have a broad power to establish qualifications for entry into certain professions which are subject only to cursory review." Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 417 (1966). Moreover, the only challenge in *Hawker* was that the state statute constituted an ex post facto law, and the full scope of due process was not in issue. *Hawker* is taken up at greater length under Question III, *infra*.

and character of rehabilitation are among the "material circumstances" that the due process clause makes relevant. Furthermore, neither the nature of the offense, nor its relationship to the vocation sought to be pursued, nor the other "material circumstances" can properly be evaluated in the absence of an "opportunity for a fair hearing," 347 U. S. at 451; see also, *Id.* at 446; *Skinner* v. *Oklahoma*, 316 U. S. 535, 543-547 (Stone, *C.J.*, and Jackson, *J.*, concurring), a right which is deeply imbedded in our constitutional notion of due process of law, see, *e.g.*, *Greene* v. *McElroy*, 360 U. S. 474, 496-499; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 165-172 (Frankfurter, *J.*, concurring),[11] and is applicable to the states. See, *e.g.*, *Pointer* v. *Texas*, 380 U. S. 400; *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313. It is notable that the Task Force on Corrections of the President's Commission on Law Enforcement and Administration of Justice very recently recommended that with respect to occupational licensing and regulation:

> "Criminal convictions should be considered only to the extent actually relevant to fitness to participate in activities posing particular dangers to society. The legislature might specify particular convictions as grounds for disqualification, leaving it to a court or agency to determine the merits of each case. The legislature might mandate disqualification on the basis of selected, particularly relevant convictions. But it would ordinarily be best to provide for discretion so that the relevance of particular convictions could be

[11] "The history of American freedom is in no small measure the history of procedure." *Malinski* v. *New York*, 324 U. S. 401, 414 (Frankfurter, J., concurring), quoted in *In re Gault*, 87 S. Ct. 1428, 1440.

> weighed in the light of, for example, the period of time since the criminal offense, the behavior of the individual during the time, and the hardship that disqualification might cause." TASK FORCE REPORT: CORRECTIONS 91 (1967).

No provision is made in 32 M. R. S. A. §575 or in any other portion of Maine's "Act regulating collection agencies" pursuant to which Appellant may receive any kind of a hearing on his qualifications, much less a hearing in the form recommended by the Task Force on Corrections.[12]

The failure of the Maine Legislature to provide for a procedure such as those recommended by the Task Force on Correction or for some other kind of fair hearing (instead of erecting an absolute disqualification) raises a serious question of a violation of procedural due process. The failure to provide a fair hearing at which the Appellant's qualifications for licensing could be determined in the light of all the relevant circumstances (including rehabilitation) is particularly fraught with important questions of due process in that the sanction being applied here is not merely regulatory, but is also punitive in nature (see generally, discussion under Question 1, *supra*) and in this particular case is being applied retroactively.

In *United States* v. *Brown*, 381 U. S. 437, the Court struck down as a bill of attainder an act of Congress that made it unlawful for a Communist or one who had within five years been a Communist to become an officer of a labor organization. In the course of its decision, the Court ruled that:

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[12] As already noted, *supra*, it is by no means clear that a pardon would lift Appellant's disability; pardons are given as a matter of the merest discretion; and Appellant has applied for and been denied a pardon.

> "It would be archaic to limit the definition of 'punishment' to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons [or otherwise applies sanctions against] those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment [or other sanction] any the less punishment." 381 U. S. at 458.

Obviously, prevention and deterrence (and possibly retribution) were among the motives of the Legislature of the State of Maine for enacting 32 M. R. S. A. §575, and, under the test articulated in the *Brown* case, the statute is punitive.

The punitive character of the disability erected by Section 575 is rendered even more obvious when the disability is measured by the tests for "punishment" established by the Court in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144. The questions to be considered are:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S. at 168-69.

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[18] In *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 322, the Court ruled that punishment is not "restricted . . . to the deprivation of life, liberty, or property, but also embrac[es] deprivation or suspension of political or civil rights."

The Appellant submits that when each of these questions is asked with respect to Section 575, the obvious answers compel the conclusion that this is a law that provides for punishment. First, the sanction does involve an affirmative disability. Second, historically it has been regarded as punishment. See, *e.g., Cummings* v. *Missouri,* 71 U. S. (4 Wall.) 277; *Ex parte Garland,* 71 U. S. (4 Wall.) 333; *Hawker* v. *New York,* 170 U. S. 189, 200-205 (dissenting opinion). Third, the sanction could not be applied except upon an earlier finding of *scienter.* Fourth, under Question 1, *supra,* it has been amply demonstrated that the sanction promotes the retributive and, perhaps, the deterrent aims of punishment. Fifth, while an alternative purpose may rationally be connected and is assignable to it, as has been pointed out under Question 1, *supra,* the sanction is excessive in relation to the alternative purpose assigned.

Since, according to the tests established in *United States* v. *Brown* and *Kennedy* v. *Mendoza-Martinez,* 32 M. R. S. A. §575 is punitive, it follows that the sanction may not be applied "without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments", *Kennedy* v. *Mendoza-Martinez,* 372 U. S. at 164, and incorporated or absorbed into the Fourteenth Amendment. See, *e.g., Gideon* v. *Wainwright,* 372 U. S. 335; *Pointer* v. *Texas,* 380 U. S. 400. It is true, however, that the sanction of disqualification in this case appears to be based upon a decision that was rendered after a full judicial proceeding at which guilt was determined. It might, therefore, be unnecessary for a new, complete criminal proceeding to be provided before one in Appellant's position may be disqualified from an occupation. But this does not mean that the State has no obligation to provide some

form of additional and fair hearing before applying the penalty of disqualification, for:

> "The felon's trial adjudicated only the issue of his guilt or innocence of the crime alleged. It in no way considered either his moral character at the time or his fitness to exercise any of the rights which the civil disability laws later deny him. Thus the convicted felon has never been given a judicial hearing on the question whether his character is such that he should be forever kept from the polls or denied the opportunity to enter certain professions or occupations." *Cf.* Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 421 (1967); see also, TASK FORCE REPORT: CORRECTIONS 90-92 (1967).

3. 32 M. R. S. A. §575, on its face, and as interpreted and applied in this case, violates the prohibition against *ex post facto* laws contained in Section 10 of Article I of the United States Constitution?

In *Hawker* v. *New York*, 170 U. S. 189, a state statute then in force made it a crime to practice medicine after conviction for a felony. The sole challenge made by the appellant was that the statute could not be applied to him because it was passed after his felony conviction, and, therefore, that application to him would render the statute an *ex post facto* law. With three Justices dissenting, the Court upheld the application of the statute. Similarly a plurality upheld the statute involved in *De Veau* v. *Braisted*, 363 U. S. 144, 160 against challenge that application of the statute to the appellant would render it an *ex post facto* law.

The classical definition of an *ex post facto* law was established by the Court in *Calder* v. *Bull,* 3 Dall. 386, 390 to include:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense in order to convict the offender." (Emphasis supplied.)

There is a substantial question in this appeal whether application of 32 M. R. S. A. §575, to disqualify Appellant, three years after he completed service of his sentence for a felony of which he was convicted six years before passage of the statute, is an *ex post facto* law.

In *De Veau* v. *Braisted,* 363 U. S. 144, 160, Justice Frankfurter for the plurality wrote that:

> "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession."

Justice Frankfurter then concluded, with respect to the statute under review, that:

> "The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the water-front, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." 363 U. S. at 160.

As already noted, no such legislative proof is present in this case. Furthermore, it is significant that the decisions both in *De Veau* v. *Braisted, supra,* and *Hawker* v. *New York,* 170 U. S. 189, were rendered before this Court decided *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168-69 and *United States* v. *Brown,* 381 U. S. 437, 458, and re-evaluated its approach to the question of what constitutes punishment. Under the current view of punishment, discussed at length under Question 2, *supra,* it appears that Section 575 is "a law that charges the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull,* 3 Dall. 386, 390. See also, *Hawker* v. *New York,* 170 U. S. 189, 200-205 (Harlan, Peckham and McKenna, *JJ.*, dissenting).

CONCLUSION

As discussed above, examination of the recent decisions of this Court raises serious constitutional doubts as to the validity of 32 M. R. S. A. §575 which absolutely bars persons in Appellant's position from the occupation of collection agent. Involving a dangerous retroactive abridgment of the personal liberty to freely choose one's occupation, this case therefore presents substantial federal questions that merit the full consideration of this Court.

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